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Nos. 82-185, 82-246 and 82-259.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

BOSTON FIREFIGHTERS UNION, LOCAL 718,
PETITIONER,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

BOSTON POLICE PATROLMEN'S ASSOCIATION, INC.,
PETITIONER,
v.
PEDRO CASTRO, ET AL.,
RESPONDENTS.

NANCY B. BEECHER, ET AL.,
PETITIONERS,
v.
BOSTON CHAPTER, N.A.A.C.P., INC., ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief on the Merits for Petitioner, Boston Firefighters Union, Local 718.

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Question Presented.

Can a federal court in an employment discrimination case grant increased competitive job security to junior minority firefighters who were not victims of the acts of past discrimination, by suppressing a *bona fide* statute requiring layoffs by seniority to the detriment of senior non-minority firefighters then terminated out of seniority?

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Constitutional and Statutory Provisions Involved.

The constitutional provision is as follows: the equal protection component of the Due Process Clause of the Fifth Amendment.

The statutes are as follows: 42 U.S.C. §§ 1981, 1983 and 1988 and §§ 703(a), 703(h), and 706(g) of the Civil Rights Act of 1964, as amended (CRA), 42 U.S.C. §§ 2000 e-2(a), 2000 e-2(h) and 42 U.S.C. § 2000 e-5(g); and Mass. Gen. Laws, c. 31, §§ 33 and 39.

The text of Amendment V and the statutes is set forth in the petition for certiorari at Pet. A. A39 to A47.[1]

Statement of the Case.

A. *Introduction.*

The district court directed the maintainance of specific percentages of black and Spanish-surnamed firefighters after personnel reductions in the Boston Fire Department by ordering that layoffs not be made pursuant to a state civil service seniority statute, Mass. Gen. Laws c. 31, § 39 (Pet. A. A28, A29, A46, A47) where minority persons so insulated from layoff were not victims of the earlier discriminatory acts.

Massachusetts General Laws c. 31, § 39 provides that if permanent employees are "separated" for lack of funds or work, separations are to occur by seniority exclusively and least senior employees are to be separated first. Pet. A. A46, A47. "Seniority" is defined in Mass. Gen. Laws c. 31, § 33 to be, "ranking based on length of service . . . computed from the first date of full-time employment as a permanent employee, . . . in the departmental unit." Pet. A. A43.

The Court of Appeals for the First Circuit affirmed on May 11, 1982, that "[t]he district court had the equitable power to modify the consent decrees, that the Massachusetts statutory

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[1] "Pet. A." identifies references to the opinions of the courts below relating to the disputed August 7, 1981 order and to the relevant constitutional and statutory texts reproduced in the Appendix accompanying Local 718's petition (No. 82-185). The Joint Appendix is cited as "J.A. ."

last hired, first fired seniority system is not insulated from the Court's orders, and that the orders are not unconstitutional." *Boston Chapter, NAACP* v. *Beecher*, 679 F.2d 965, 978 (1st Cir. 1982); Pet. A. A26. The First Circuit acknowledged that "the district court's order superseded the operation of the reverse seniority layoff provisions of the Massachusetts civil service statute. . . ." 679 F.2d at 973; Pet. A. A16. In its view, federal court orders could "require that there be a certain percentage of minorities on the Police and Fire Departments without regard to whether the individuals compromising the minority percentage were the actual victims of past discrimination." *Id.* at 975; Pet. A. A20, A21; and this "is not a case of wrong or right; it is a case of two competing rights, earned seniority versus racially balanced police and fire departments." 679 F.2d at 977; Pet. A. A24.

B. *The 1974 Decree.*

Black and Spanish-surnamed applicants for firefighter appointments in Boston and other Massachusetts cities and towns and their associational representative (Boston Chapter, N.A.A.C.P., Inc.) commenced a class action in 1972 asserting that recruitment and certification procedures, and specifically the state developed and administered firefighter examination, discriminated racially in violation of 42 U.S.C. §§ 1981 and 1983. The United States of America initiated a second action asserting similar claims that the City of Boston and its Fire Commissioner and the Massachusetts Civil Service Commission and its Director had violated §§ 1981 and 1983 and also had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* The actions were consolidated.

Following trial, the district court found that Boston's combined minority population was twenty-three percent (23%) of Boston's total population and that blacks and Spanish-sur-

named persons constituted less than one percent of its fire department's uniformed personnel. *Boston Chapter, NAACP, Inc., et al.* v. *Beecher*, 371 F. Supp. 507, 514 (D. Mass. 1974). On the basis of the "insignificant" number of minority persons certified and the tests' lack of job-relatedness, the district court concluded that the firefighter entrance examinations administered from 1968 through August, 1971 were racially discriminatory. *Id.* at 507, 510 and 517. It also found that word of mouth recruitment practices of the City of Boston resulted in unintentional racial discrimination. *Id.* at 519-520.

The district court entered a decree on February 8, 1974 that required development and use of a job-related entrance examination; established priority certification groups and certification procedures; directed that its procedures for certification of firefighter job candidates should apply to all Massachusetts cities and towns having at least a one percent (1%) minority population until the complement of minority fire department personnel of such a municipality was commensurate with its minority population; and obligated recruitment of minorities in Boston, 371 F. Supp. at 520-527. The Court of Appeals for the First Circuit affirmed. 504 F.2d 1017 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975).

The priority certification groups established by this February 8, 1974 decree, from which the Massachusetts Civil Service division was to certify firefighter job candidates were as follows:

> "Group A" comprised of all black and Spanish-surnamed applicants who failed the August, 1971 or an earlier discriminatory entrance examination, but had passed the new examination;
> "Group B" comprised of all persons on the division's eligibility lists developed from the August, 1971 examination;

"Group C" comprised of all black and Spanish-surnamed persons who passed a new examination excluding all Group A members; and

"Group D" comprised of all candidates other than members of Groups A, B, and C who passed a new examination.

371 F. Supp. at 522.

Candidates for Boston's *permanent* fire department appointments were to be certified on the basis of one certification from Group A for each certification from Group B until exhaustion of Group A; thereafter one certification was to be made from Group C for each certification from Group B. 371 F. Supp. at 523.[2]

Thus, all black and Spanish-surnamed candidates for Boston Fire Department permanent appointments who failed a discriminatory examination and passed a new examination (Group A) had an absolute priority for certification over black and Spanish-surnamed candidates who never took a discriminatory examination (Group C); and no pairings of certifications between Group B and Group C could or did occur until exhaustion of Group A.[3]

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[2] Prior to the use of a new examination and the start of the certification pairings, a 1975 interim order contracted Group B's population to all persons appointed as *provisional* firefighters by earlier court authorizations. J.A. 16a, ¶ 21. This contracted population's permanent appointments were deferred pending pairings with Group A or C members under the terms of the 1974 decree. 371 F. Supp. at 523. Although such provisional firefighters were on the job in some instances for years earlier, their seniority under Mass. Gen. Laws c. 31, § 33 commences only on their permanent appointment. It was their greater seniority by date of permanent appointment, that was set aside by the August 7, 1981 order.

[3] For all practical purposes, certification was permanent appointment as a firefighter.

C. *Examination and Recruitment Measures After the February 8, 1974 Decree.*

Under a detailed April, 1975 interim consent decree (J.A. 9a-18a), a specified new entrance examination was administered in July, 1975. This interim decree also directed that further examinations should be administered if that new examination did not yield sufficient Group C populations or if a Group C's population became depleted. J.A. 11a, ¶ 6.

Following the July, 1975 examination and before establishment of its eligibility list, the then parties entered an "Agreement To Effectuate Interim Consent Decree" that treated a variety of issues, *e.g.*, post-examination reports, medical and strength/agility examination procedures. This agreement, which was approved by the district court on November 25, 1975 (J.A. 19a-22a) stated in part:

> In the cities of Boston, Brockton, Cambridge, Chelsea, Holyoke, Lawrence, Lynn, New Bedford, Springfield, and Worcester, the Division [of Civil Service of Massachusetts] shall give additional firefighter examinations, during the life of the list from the July, 1975 exam,[4] if it appears, or in fact becomes, impossible to certify applicants to the above-named cities in accordance with the Decree of this Court dated February 8, 1974, and the Interim Consent Decree, dated April 17, 1975, in a manner which will effectuate the said Decrees. In the cities or towns, other than the above named, the Division shall not be required to give additional examinations during the life of the list from the July, 1975, exam even if the A and C Pools become depleted.

J.A. 21a, ¶ 8.

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[4] This eligibility list expired on May 25, 1978. J.A. 33a.

Both Boston Groups A and C had become depleted over a year *prior* to the 1978 expiration of that new (1975) eligibility list.

The parties executed a "Further Agreement to Effectuate Interim Consent Decree", approved by the district court on *April 6, 1977*, "since it [was] apparent that the "C" pools for the Cities of Boston, Cambridge, Holyoke, Lawrence, New Bedford, Worcester and Springfield have become depleted." J.A. 32a. Under this 1977 measure's terms, the state personnel administrator[5] held examinations on June 11 and July 23, 1977 and new eligibility lists were established which would expire two years after their dates of establishment. J.A. 32a, ¶ 4; 34a, ¶ 11.

The Group C populations still could not be maintained. Additional entrance examinations were administered in June 1978, and again in June, 1980. J.A. 35a; 37a, ¶2.

The 1974 decree as well as later implementation decrees put major emphasis on pre-examination recruitment. At no time after the February 8, 1974 decree until 1979 did the private and government plaintiffs criticize any recruitment efforts. In August and October of 1979 the private and federal plaintiffs asserted that the personnel administrator and City of Boston had engaged in inadequate recruitment for the 1978 examination. The claims were resolved by a consent order dated March 12, 1980, providing for the June, 1980 administration of a firefighter entrance examination for Boston and Springfield, Massachusetts, open only to residents of each city and preceded by a recruitment effort satisfactory to plaintiffs. J.A. 37a, 39a. This March order mandated further entrance examinations if the Boston Group C pool was still insufficient. J.A. 40a, ¶5.

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[5]The Massachusetts Civil Service structure changed effective January 1, 1975 and the examination duties of the former division of Civil Service became the responsibility of the state personnel administrator.

Thus, Boston's Group C, black and Spanish-surnamed persons who passed a new examination excluding all Group A members, was constituted after new examinations in July, 1975; July, 1977; June, 1978; and June, 1980, with each examination being preceded by satisfactory recruitment.

D. *Post 1974 Decree Boston Fire Department Hiring.*

Boston Fire Department's permanent firefighter appointments after entry of the February 8, 1974 decree through the 1981 layoffs is as follows:

	Total Hired	Blacks and Spanish Surnamed Hired	Percent Blacks and Spanish Surnamed Hired
1976	79	34	43 percent
1977	198	90	45 percent
1978	179	87	49 percent
1979	52	27	52 percent
1980	45	10	22 percent
(Total)	553	248	45%

J.A. 43a.

Since Boston's initial Group C population established after the July 1975 examination had become depleted prior to April 6, 1977 (J.A. 32a) (and no revived Boston Group C, by court order, was to be in place earlier than November 30, 1977 (J.A. 33a, ¶ 6)) the 124 blacks and Spanish-surnamed firefighters hired in 1976 and 1977 included Boston's complete Group A population and its entire initial Group C population. These 1976 and 1977 hires, by definition, included all persons vic-

timized by failure to pass discriminatory examination and by deficient recruitment (Group A).[6]

Conversely, and significantly, the 124 Boston blacks and Spanish-surnamed firefighters hired in 1978, 1979, and 1980 were Group C first time, new examination candidates who had *never failed* a discriminatory test and who had enjoyed the benefit of sanctioned recruitment efforts.

E. *The 1981 Layoffs.*

Early in July, 1981, Boston initiated a systematic program of terminations from its fire department because of alleged fiscal exigency.[7] Prior to the commencement of the layoff waves, Boston's Fire Department employed 1690 sworn personnel, of whom 248, or 14.7%, were black or Spanish-surnamed persons. J.A. 43a, ¶ 4. At the outset of the litigation in 1972, that percentage was only 0.9%. At the time of entry of the 1974 decree, blacks and Spanish-surnamed persons constituted at least 23% of Boston's population; in July, 1981, the minority population percentage had increased to 30%. 679 F.2d at 970; Pet. A. A35; J.A. 43a, ¶ 5.

Boston initiated its firefighter layoff program by seniority in compliance with Mass. Gen. Laws c. 31, § 39 (J.A. 44a,

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[6] It is possible that Group A could be revived if a black or Spanish-surnamed candidate who failed the August, 1971 or an earlier examination passed a post-1975 test; no such candidate has been identified.

[7] The district court found that the "massive firings" were the result of the state electorate's adoption of "Proposition 2½", Mass. St. 1980, c. 580, (a tax limitation measure with a principal feature restricting annual assessment to 2½% of fair cash value of real and personal property in some municipalities and that its adoption was a "new and unforeseen" development. Pet. A. A37. However, the fiscal difficulty involved here was aggravated by state court ordered property tax abatements owed successful taxpayer plaintiffs against the City of Boston in sums estimated to range between $50 million and $75 million dollars. The city budgeted these payments out of its general budget. Transcript, July 30, 1981, pp. 12, 13 and 15.

¶¶ 7-10; 45a, ¶ 13). Layoffs by seniority occurred on July 8, 15, 22, 29 and August 5, 1981 (prior to entry of the district court's August 7, 1981 order) totalling 173 firefighters, of whom 81 were black or Spanish-surnamed. *Id.* The program proposed a sixth layoff to occur on August 12, 1981, of 34 firefighters, of whom 32 would be black or Spanish-surnamed. J.A. 44a, ¶ 11(a).

If the layoffs observed the statute's seniority rule, 94 non-minority firefighters, 113 black and Spanish-surnamed firefighters, all hired in 1978 through 1980, would have been terminated. The layoffs would have left a 9.1% black and Spanish-surnamed representation in the Boston Fire Department. J.A. 44a; 45a, ¶ 11(a).

The district court's August 7, 1981 order enjoined layoffs by seniority if they resulted in a reduction of minority firefighters below 14.7%. Pet. A. A28, A29. The order's terms permitted termination of only 30 black and Spanish-surnamed firefighters. The data before the Court (J.A. 43a-45a), depicts the following consequences of the August 7, 1981 order:

> (a) if the announced 207 terminations proceeded by seniority the total layoffs would have extended into but not through the 1978 hires;
> (b) since the order allowed layoff of only 30 black and Spanish-surnamed firefighters to preserve the 14.7% population, Boston had to recall and retain all minority firefighters hired in 1978 and 7 hired in 1979 and terminate all 92 non-minority firefighters hired in 1978 and 25 non-minority firefighters hired in 1977; and
> (c) had seniority regulated the separation program, 83 non-minority firefighters who were laid off would have retained their jobs.

Summary of Argument.

I. It is settled that § 703(h) of Title VII immunizes *bona fide* seniority systems and their routine applications. Massachusetts General Laws c. 31, §§ 33 and 39 enact a *bona fide* seniority system requiring that fiscally induced layoffs proceed by "seniority" defined as "rankings based on length of service." The suppression approved by the First Circuit is contrary to that congressional conferral of immunity. Such immunity continued when Congress extended Title VII to certain public employers including the City of Boston and extends to *all bona fide* seniority systems.

Section 1988 of 42 U.S.C., requires that courts in actions pursuant to §§ 1981 and 1983 of 42 U.S.C. apply § 703(h) of Title VII to immunize *bona fide* seniority systems because § 703(h) is federal law that must be applied in exercising jurisdiction pursuant to, and in enforcement of, §§ 1981 and 1983. (Pp. 13-19.)

II. Award of competitive superseniority to insulate less senior minority firefighters from layoff, thus causing the layoff of senior non-minority firefighters, conflicts with applicable decisions of this Court because that award conferred such superseniority upon individuals who were not victims of earlier discriminatory acts. (Pp. 19-23.)

III. The disputed order does not satisfy the tolerances extended to private parties in the design and application of voluntary affirmative action plans and violated the Title VII, §§ 1981 and 1983 rights of terminated senior non-minority firefighters under applicable decisions of this Court. Inasmuch as the range of action for private parties is broader than the scope of action available to governmental entities, if the measure does not satisfy the limitations imposed on private parties, it surely fails as a governmental measure. (Pp. 23-26.)

IV. The disputed order violates the rights of non-minority firefighters to equal protection of laws pursuant to the Due Process Clause of the Fifth Amendment.

It exceeded the limited remedial powers of the federal courts by using a racial and ethnic preference to confer layoff protections upon individuals who were never victims of the identified discrimination to the decisive disadvantage of innocent senior individuals who did not possess the preferred racial and ethnic characteristics and, therefore, is not necessary for a compelling purpose of remedying past discrimination.

The disputed order imposed the entire burden of a remedy for discrimination upon innocent persons who were more senior and identical in every respect save race and ethnicity. This imposition is not tailored to the original wrong and is an invidious racial displacement preference that is improper under equal protection guarantees of the Constitution.

The First Circuit's justification that a racially balanced Boston Fire Department is necessary to provide effective firefighting services must be discredited by this Court because that justification lacks any basis in the record and accepts that public racial perceptions may dictate public agency staffing policies. Any currency to such a theory of justification would seem to delay, if not subvert, achievement of the constitutional goal of making race and ethnicity an irrelevant factor in our national life. Neither "racial equity" nor operational needs is demonstrated here to be a compelling need to justify this use of racial and ethnic exclusionary criteria.

The concern and purpose to insure a 1981 specific racial balance, the First Circuit's "racial equity", requires that the decision of the First Circuit be reversed since there is no substantive constitutional warrant for any racial balances in any population. (Pp. 26-38.)

Argument.

I. The First Circuit's Ruling is Inconsistent with the Immunity Extended by Congress to Bona Fide Seniority Systems.

The issue is well described by the Court of Appeals at 679 F.2d 966 (Pet. A. A2) "[t]his case arises from a conflict between a statutorily established seniority system mandating layoffs on a last hired, first fired basis and court orders insulating a percentage of minorities from such system." In the First Circuit's view, a federal court can prevent neutral, *bona fide* seniority layoffs in order to guarantee maintenance of a specific minority percentage in a work force; otherwise, "[t]o hold a seniority system inviolate . . . would make a mockery of relief already granted." 679 F.2d 975; Pet. A. A19.

The statute suppressed by the order disputed in this case, Mass. Gen. Laws c. 31, § 39, enacts a system of "competitive seniority" whereby fiscally induced layoffs proceed only by "rankings based on length service."[8] Such a seniority layoff mechanism has been a feature of the Massachusetts Civil Service code since 1928. *See, McDonald* v. *City Manager of Fall River*, 273 Mass. 368, 173 N.E. 593 (1930). Section 39 has never been challenged during this decade-long litigation and its *bona fides* is assumed. 679 F.2d 973, 975; Pet. A. A16, A20. Of course, any direct challenge to § 39 faced most formidable difficulties. *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 273-74 (1979).

The suppression of § 39 approved by the First Circuit is inconsistent with the immunity conferred upon seniority systems

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[8] As to competitive seniority, *see, Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 766 (1977): ("one of its major functions is to determine who gets or who keeps an available job.") citing *Humphrey* v. *Moore*, 375 U.S. 335, 346-347 (1964).

by § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h).[9] The Court of Appeals saw the effects of seniority layoffs by statute as "devastating", 679 F.2d 970; Pet. A. A11: 45.6% of the black and Spanish-surnamed firefighters (113 of 248) would be laid off, thus reducing the Boston Fire Department's minority percentage from 14.7% to 9.1%. Yet such layoffs were by "ranking based on length of service" or "seniority", upon neutral application of the layoff statute (Mass. Gen. Laws c. 31, §§ 33 and 39) to minority and non-minority employees alike. Such layoff results are a permitted routine application of a *bona fide* seniority system. *Teamsters* v. *United States*, 431 U.S. 324, 350 (1977). As pointed out by this Court, "both the literal terms of § 703(h) and the legislative history of Title VII demonstrate that Congress considered this very effect of many seniority systems and extended a measure of immunity to them." *Id.*[10] An injunction against application of Mass. Gen.

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[9] Section 703(h) of Title VII, 42 U.S.C. § 2000(e)-2(h) states:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

[10] That legislative history is well-known. *American Tobacco Co.* v. *Patterson*, ____ U.S. ____, 102 S.Ct. 1534, 1539-40 (1982); *Teamsters*, *supra*; *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 759-762 (1976).

Laws c. 31, § 39 could "lie only if the requirement of § 703(h) — that such application be intentionally discriminatory — were satisfied." *American Tobacco Co.* v. *Patterson*, ___ U.S. ___, 102 S.Ct. 1534, 1538 (1982); *Pullman-Standard* v. *Swint*, ___ U.S. ___, 102 S.Ct. 1781 (1982); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 82 (1977); *Teamsters* v. *United States, supra*, at 431 U.S. 352 (1977); and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 559-60 (1977).

Put another way, in enacting Title VII, Congress, being fully aware of the extent and importance of seniority systems, afforded *bona fide* seniority systems very "special treatment". *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 81 (1976). Such "special treatment" continued when Congress amended the Civil Rights Act of 1964 to apply Title VII to certain public employers (including the City of Boston) in 1972; "Congress expressly indicated the intent that the same Title VII principles be applied to governmental and private employers alike." *Dothard* v. *Rawlinson*, 433 U.S. 321, 332 n.14 (1977); and "[s]ection 703(h) on its face immunizes *all bona fide* seniority systems. . . ." *American Tobacco Co., supra*, at 102 S.Ct. 1541 (emphasis in original).

This litigation's §§ 1981 and 1983 auspices cannot support a broader power to negate a *bona fide* seniority system. There is plain congressional instruction that § 703(h) must be heeded in §§ 1981 and 1983 actions: 42 U.S.C. § 1988 states, in part, "jurisdiction . . . conferred on the district courts by the provisions of this Title and of Title 'CIVIL RIGHTS' . . . for the protection of persons in the United States shall be exercised and enforced in conformity with the laws of the United States. . . ." Section 1988 instructs "federal courts as to what law to apply in causes of action arising under federal civil rights acts." *Moor* v. *County of Alameda*, 411 U.S. 693, 703 (1973). Such law includes § 703(h), *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471, 474, 475 (4th Cir. 1978), *cert. denied*, 440

U.S. 979, 99 S.Ct. 1785, 60 L.Ed.2d 239 (1979). Accord, *Chance* v. *Board of Examiners & Bd. of Ed., etc.*, 534 F.2d 993, 998 (2d Cir. 1976), *cert. denied*, 431 U.S. 965 (1977).[11] See, *Watkins* v. *United Steelworkers of Am. Local No. 2369*, 516 F.2d 41, 44-5 (5th Cir. 1975); *Waters* v. *Wisconsin Steel Works of Int. Harvester Co.*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976); and *Jersey Cen. Pow. & Li. Co.* v. *Local Un. 327, etc. of I.B.E.W.*, 508 F.2d 687 (3d Cir. 1975) *cert. denied*, 425 U.S. 998 (1976).

Apparently, the First Circuit does not disagree with the view that 42 U.S.C. §§ 1981 and 1983 and Title VII involve co-extensive remedial powers in light of its citation of *Setser* v. *Novack Inv. Co.*, 657 F.2d 962, 966-67 (8th Cir. 1981) with approval. 679 F.2d 976. The Eighth Circuit states at 657 F.2d 967, in part:

> We are mindful that "[i]n fashioning a substantive body of law under section 1981 the courts should, in an effort to avoid undesirable substantive law conflicts, look to the principles of law created under title VII for direction.[n]

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[11] The Fourth Circuit holds that 42 U.S.C. § 1988, through § 703(h), protects seniority systems in § 1981 actions. 575 F.2d, at 474-75. The Second Circuit rejected the assertion of any different reach of §§ 1981 and 1983, at 534 F.2d 998: "that plaintiffs herein are proceeding under 42 U.S.C. §§ 1981, 1983 does not render defendants' seniority system any more susceptible to attack. Congress has clearly placed its stamp of approval upon seniority systems in 42 U.S.C. § 2000(e)(2) (footnote omitted)."

[n] [The original footnote continues in pertinent part:]

. . . . . .

> For the most part, title VII and section 1981 have similar requirements and remedies. *Markey* v. *Tenneco Oil Co.*, 635 F.2d 497, 498 n.1 (5th Cir. 1981); *Whiting* v. *Jackson State Univ.*, 616 F.2d 116, 121 (5th Cir. 1980). Section 1981 affords no greater substantive protection that title VII against employment discrimination, *New York*

> This directive is all the more important for determining standards for affirmative action. Divergent standards under the two statutes would render employers unable to remedy some past discriminatory practices, even though the practices were in violation of title VII. Consequently, some effects of employment segregation would be "locked-in." *Id.* at 215, 99 S.Ct. at 2733 (Blackmun, J., concurring). Moreover, by equating the affirmative action standards of title VII with those of section 1981, we obviate the employer's risk of inconsistent obligations.

This view that the remedial powers under 42 U.S.C. § 1981 and Title VII are co-extensive is implied by *New York Transit Authority* v. *Beazer*, 440 U.S. 568, 584 n.24 (1979) ("our treatment of the Title VII claim also disposes of the § 1981 claim without need of a remand. Although the exact applicability of that provision has not been decided by this Court, it seems clear that it affords no greater substantive protection than Title VII" *Id.*), and *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 459 (1975) ("In particular, Congress noted 'that

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City Transit Auth. v. *Beazer*, 440 U.S. 568, 583 n.24 (1979), and in some respects may afford less. *Compare Guardians Ass'n* v. *Civil Serv.*, 633 F.2d 232, 263-68 (2d Cir. 1980) *with Davis* v. *County of Los Angeles*, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625, 99 S.Ct. 1379, 59 L.Ed.2d 642 (1979), with regard to the question of whether a showing of disproportionate impact is sufficient to make a prima facie case under section 1981. Bona fide seniority systems appear to receive the same substantive protection under both title VII and section 1981, but the question may be open to some doubt. *Compare Pettway* v. *American Cast Iron Pipe Co.*, 576 F.2d 1157, 1191 n. 37, 1712 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S.Ct. 1020, 59 L.Ed.2d 74 (1979); *Johnson* v. *Ryder Truck Lines, Inc.*, 575 F.2d 471 (4th Cir. 1978), *cert. denied*, 440 U.S. 979, 99 S.Ct. 1785, 60 L.Ed.2d 239 (1979) *with Bolden* v. *Pennsylvania State Police*, 578 F.2d 912, 920-21 (3d Cir. 1978).

the remedies avialable to the individual under Title VII are co-extensive with the indiv[i]duals right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.")

The First Circuit cites approvingly *Brown* v. *Neeb*, 644 F.2d 551 (6th Cir. 1981) to support its conclusion that seniority can be suppressed. 679 F.2d 972, 978; Pet. A. A15, A25. On May 7, 1982, the Sixth Circuit also decided *Stotts* v. *Memphis Fire Dept.*, 679 F.2d 541 (6th Cir. 1982), *cert. applied for* August 4, 1982, No. 82-206, 1982 Term. However, the majority of the five (5) judges on the Sixth Circuit's panels agree with the results here urged by Local 718. *Brown* v. *Neeb*, *supra*, is described misleadingly in West Federal Reporter. Judge Keith's opinion, which the First Circuit quotes, is *not* a majority opinion of that panel. Judge Brown authored a plurality opinion concurring in the result in which Judge Wiseman joined, in *Brown* v. *Neeb*, *supra*, and Judge Brown repudiates Judge Keith's views as follows: "In my view, even though this action was brought pursuant to 42 U.S.C. §§ 1981 and 1983 . . . the district court did not have the authority, when it issued the preliminary injunction, to abrogate the contract and statutory rights of the Union to layoffs by seniority." 644 F.2d at 566. In *Stotts*, *supra*, Judges Keith and Duncan joined a majority opinion holding that seniority could be suppressed and Judge Martin dissented vigorously, agreeing with Judge Brown's reasoning. 679 F.2d at 568. Thus, Judges Brown, Wiseman and Martin are of a view that contract and statutory seniority rights cannot be abrogated, but Judges Keith and Martin opine that abrogation is permissible.

In short, Congress considered the conflict between established *bona fide* seniority systems mandating layoffs on a last hired, first fired basis and affirmative action in its enactment of the Civil Rights Act of 1964. Congress chose to afford "spe-

cial treatment" to such systems, *Trans World Airlines, Inc.* v. *Hardison, supra*, at 432 U.S. 81 and to extend immunity to their routine applications. *Teamsters* v. *United States, supra*, at 421 U.S. 352. These principles remain viable and apply to *all* seniority systems, whether such systems are the product of state law or collective bargaining agreements, in the public and private sectors regulated by Title VII. *Accord, Dothard* v. *Rawlinson, supra*, at 433 U.S. 331-32 n. 14 (1977). Unless Mass. General Laws c. 31, § 39 was adjudicated to be intentionally discriminatory, no injunction against its neutral application was within the power of either the district court or the Court of Appeals. *American Tobacco Co.* v. *Patterson, supra*, at 102 S.Ct. 1538 and *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256, 273-4 (1979). The First Circuit may disagree with the balance struck in the conflict between *bona fide* seniority layoff systems and affirmative action but it must abide Congress's choice.

II. Award of Competitive Superseniority to Non-Victims was Improper.

The First Circuit denies that its judgment involves any award of seniority, 679 F.2d at 975; instead, it views the case as one involving "two competing rights, earned seniority and racially balanced police and fire departments." 679 F.2d at 977.

Its disavowal truly blinks at the facts. The district court's 1981 order mandating a 14.7% minority representation in the Fire Department's complement required the use of separate seniority lists for black and Spanish-surnamed employees and for non-minority employees. Layoffs, re-employment and reinstatement had to proceed by strict ratio to maintain that percentage using these racially separate lists. Pet. A. A28, A29.

Thereby junior black and Spanish-surnamed firefighters hired in 1979 obtained greater protection from layoff than their "ranking by length of service" entitled them. The Court of Appeals agrees that this use of separate racially distinctive seniority should supersede the neutral layoff provisions of the civil service statute. 679 F.2d 973; Pet. A. A16.

If the layoffs had proceeded according to the statute's seniority principle, 113 blacks and Spanish-surnamed firefighters would have been laid off. Instead, the district court's order permitted layoffs of only 30 of the 248 black and Spanish firefighters employed on July 1, 1981.

To deny that this case involves an award of seniority is fiction; the order here conferred competitive superseniority by insulating junior blacks and Spanish-surnamed personnel from layoff.

All of the minority firefighters benefitting by this judicial award of constructive superseniority were persons hired in 1979 and 1978 and were Group C candidates. None of its beneficiaries, by definition, were victims or identified as victims of any earlier racially discriminatory practices.

Award of such constructive competitive superseniority to minority class members other than actual, identified victims of a discriminatory act is improper under the clearest and most explicit rulings of this Court.

Award of retroactive competitive seniority to identified victims of discriminatory employment practices to insert victims in their rightful places in a seniority hierarchy is proper and just. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 756, 765, 766, 768 (1976). If class members are not in fact victims of previous hiring discrimination, an award of enhanced competitive seniority is improper. *Id.* at 772-773. *Accord*, *Zipes* v. *Trans World Airlines, Inc.*, 455 U.S. 915, 102 S.Ct. 1127, 1136 (1982) (class-based seniority relief for identifiable victims of illegal discrimination is a form of relief generally appropriate under § 706(g).)

Teamsters v. *United States*, 431 U.S. 324 (1977) reminds that it is a "delicate task [to adjust] the remedial interests of discriminatees and the legitimate expectations of other employees innocent of any wrongdoing" *after victims* are identified and rightful places determined. *Id.* at 372. As this Court points out, *Id.* at 371-372:

> Initially, the court will have to make a substantial number of individual determinations in deciding which of the minority employees were actual victims of the company's discriminatory practices. After the victims have been identified, the court must, as nearly as possible, "recreate the conditions and relationships that would have been had there been no" unlawful discrimination. (Citation omitted.)

Here the seniority suppression and senior employee layoffs, with employment retention by non-victims[12] is the identical situation deplored in this Court's comments in *Ford Motor Co.* v. *E.E.O.C.*, ___ U.S. ___, 102 S.Ct. 3057, 3069-70 (1982):

> As we have acknowledged on numerous occasions, seniority plays a central role in allocating benefits and burdens among employees. In light of the "overriding importance" of these rights, *American Tobacco Co.* v. *Patterson*, 456 U.S. ___, ___, 102 S.Ct. 1534, 1541, 71 L.Ed.2d 748 (1982) (quoting *Humphrey* v. *Moore*, 375 U.S. 335, 346 . . . (1964)), we should be wary of any rule that encourages

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[12] The First Circuit candidly admits that layoff protections are conferred on non-victims but deems the status of the beneficiaries to be irrelevant because of the court's objective to maintain its fixed 14.7% population percentage. 679 F.2d 975, 977; Pet. A. A2, A23.

> job offers that compel innocent workers to sacrifice their seniority to a person who has only claimed, but not yet proven, unlawful discrimination.
>
> The sacrifice demanded by the lower court's rule, moreover, leaves the displaced workers without any remedy against claimants who fail to establish their claims. If, for example, layoffs occur while the Title VII suit is pending, an employer may have to furlough an innocent worker indefinitely while retaining a claimant who was given retroactive seniority. If the claimant subsequently fails to prove unlawful discrimination, the worker unfairly relegated to the unemployment lines has no redress for the wrong done him. We do not believe that "'the large objectives'" of Title VII, require innocent employees to carry such a heavy burden. (Citation and footnote omitted.)

The order here disputed "compell[ed] innocent workers to sacrifice their seniority" to persons who could not and did not assert any entitlement as individual victims to any enhanced competitive seniority. Innocent senior workers were "relegated to the unemployment lines" solely because of their race.

Thus, the First Circuit spurns the clearest instructions of this Court that only "actual victims" are entitled to to an enhanced position in a seniority hierarchy to displace the seniority position of innocent employees; absent a determination of actual victim status, any enhancement displacing innocent employees is plain error.

The remedial powers of the federal courts may be broad, but they are not "plenary": remedies must be "tailored" to "the nature and extent of the violation." *Hills* v. *Gautreaux*, 425 U.S. 284, 294-95 (1976); and any remedy imposing burdens on other persons must be "necessary to make [the victims]

whole for injuries suffered on account of unlawful employment discrimination." *Regents of University of California* v. *Bakke*, 438 U.S. 265, 301 (1978) (opinion of Powell, J.), quoting *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 763 (1976) and *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975). Under settled principles, an award of superseniority to persons who never sat for, let alone failed, any invalid examination to the decisive disadvantage of innocent competitors in is not "tailoring" a remedy. The First Circuit approach is even more suspect since its theory of the 1974 findings of violation was specifically discredited in *Washington* v. *Davis*, 426 U.S. 229, 245 n.12 (1976) ("to the extent that those cases rested on or expressed the view that proof of discriminatory racial purpose is unnecessary in making out an equal protection violation, we are in disagreement." *Id.*; one of those cases so identified is *Castro* v. *Beecher*, 459 F.2d 725, 732-733 (1st Cir. 1972), the "police case", and *Boston Chapter, NAACP, Inc.*, 504 F.2d 1017 (1st Cir. 1974) rests on the same theory).

III. The Order Violated the Title VII and Section 1981 Rights of the Terminated Senior Non-Minority Firefighters.

The district court's order involves a government use of race and ethnicity to determine which individuals retain, and which do not retain, public employment. While it presents issues that were implicated in *Minnick* v. *California Dept. of Corrections*, 452 U.S. 105 (1981) and implicit in *Regents of University of California* v. *Bakke*, 438 U.S. 265 (1978), it also presents issues concerning the statutory civil rights of non-minority employees and the extent to which their rights can be impaired, if any impairment is ever acceptable, when an af-

firmative action plan is "judicially required", *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 280 n.8 (1976).

Surely a judicially required plan cannot exceed constitutional limitations;[13] however, the measures contained in the order cannot satisfy even the tolerances extended to private parties in the design and applications of *voluntary*, affirmative action programs.

Under the order's terms, use of separate layoff lists and maintenance of the 14.7% resulted in the discharge of 83 senior firefighters only because they were non-minority persons. *McDonald* v. *Santa Fe Trail Transp. Co.*, *supra*, 427 U.S. at 279, 280 and 286-87 established that non-minority employees are entitled to the full protections extended by § 703(a)(1) of Title VII and 42 U.S.C. § 1981 against racial discrimination in employment. *Steelworkers* v. *Weber*, 443 U.S. 193, 201 (1979) addressed the issue of whether a private voluntary affirmative action program employing race conscious features disqualifying a white employee from participation in a training and promotion program was permissible in light of the literal prohibitions of §§ 703(a)(1) and (d). *Weber*, *supra*, holds "that title VII's prohibition in §§ 703(a) and (d) against racial discrimination does not condemn all private, voluntary, race-conscious affirmative action plans." *Id.* at 208. This Court however cautions that not all *private* race conscious affirmative action programs are permissible: "We need not define in detail the line of demarcation between permissible and impermissible affirmative action plans; . . ." This Court observes that the Kaiser-USWA plan,

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[13] This Court notes in *Steelworkers* v. *Weber*, 443 U.S. 193, 200 (1979) that the Kaiser-USWA plan did not involve state action so that case did not present a potential violation of the Equal Protection Clause. More recently, the plurality in *Fullilove* v. *Klutznick*, 448 U.S. 448, 489 (1980) reminds that private action may be tolerable which, if implemented by governmental entities, would be intolerable under constitutional guarantees.

> does not unnecessarily trammel the interests of white employees. The plan does not require the discharge of white workers and their replacement with new black hirees. Cf. *McDonald* v. *Sante Fe Trail Transp. Co.*, 427 U.S. 273 (1976). Nor does the plan create an absolute bar to the advancement of white employees; half of those trained in the program will be white. Moreover, the plan is a temporary measure; it is not intended to maintain racial balance, but simply to eliminate a manifest racial imbalance.

443 U.S. at 208.

The disputed order clearly trespasses into the impermissible: (a) the August 7 order trammeled the interests of white employees by reorganizing their seniority entitlements; (b) the August 7 order impelled the layoff of white workers and their replacement by junior black firefighters; its implementation required immediate recalls of black and Spanish-surnamed firefighters already terminated according to the seniority principle of Massachusetts Gen. Laws c. 31, § 39 and substituted layoffs of senior non-minority firefighters;[14] and (c) the August 7 order insisted on rigid maintenance of a specific racial balance of 14.7% minority and 85.3% non-minority populations in the Boston Fire Department.

If revision of the interests of white employees, their layoff and replacement by minority workers or the maintenance of racial balance distinguish the impermissible from the permissible, this order, as an affirmative action measure for black and Spanish-surnamed employees of a public employer, vio-

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[14] The First Circuit's asserting at 679 F.2d 977 that the August 7, 1981 order did *not* require the hiring of minorities and the firing of non-minorities is patently incorrect.

lates the rights of non-minority employees pursuant to §§ 703(a)(1) and (2) of Title VII and 42 U.S.C. §§ 1981 and 1983.[15]

Putting the matter in other terms, if the Kaiser-USWA plan was a moderate and reasonable measure by private parties to address the historical absence of minority persons from skilled crafts, the order here, in contrast, is immoderate and arbitrary. Here, in the cause of affirmative action, an order favors one racial and ethnic population by inducing violations of the statutory rights of non-minority firefighters to protection from racial discrimination in their employment.[16] The 83 firefighters laid off here on the basis of their racial characteristics enjoyed the same protections from invidious treatment that their minority colleagues claimed. Their *federal* statutory rights to that protection are violated. If a private affirmative action plan incorporating the same features and effects as does this order would contravene the permissible, this order surely must do so.

IV. The Order Violates the Equal Protection Component of the Due Process Clause of the Fifth Amendment.

This case presents profound constitutional issues and significant statutory questions. While the Court should proceed on

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[15] It is worth noting that Weber was senior to senior minority employees selected for the Kaiser-USWA plan, 443 U.S. at 199. In effect separate seniority lists were used in the plan's operation. However, "seniority is not in issue because the craft training program is new and does not involve an abrogation of pre-existing seniority rights." 443 U.S. at 215 (opinion of Blackmun, J. concurring). Here the specific purpose of the order was "abrogation of pre-existing seniority rights."

[16] Lest any claim be made that no term of the order directed any layoffs, note that on the date of its entry, August 7, 1981, 155 firefighters had been laid off (J.A. 44a), of whom 68 were black or Spanish-surnamed persons.

the statutory grounds to avoid the constitutional issues, *Spector Motor Co.* v. *McLaughlin*, 323 U.S. 101, 105 (1944), if those statutory points do not resolve the matter, the Constitution, and specifically the equal protection component of the Due Process Clause of the Fifth Amendment, mandates reversal.[17]

First, "the Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington* v. *Davis*, 426 U.S. 229, 239 (1976). Second, federal courts are subject to the same constitutional limitations inherent in equal protection as are generally applicable to the United States. Third, even in cases involving a denial of constitutional rights, federal court remedial powers are not plenary; an exercise must balance individual and collective interests, and must "tailor 'the scope of the remedy' to fit 'the nature and extent of the violation'". *Hills* v. *Gautreaux*, 425 U.S. 284, 294 (1976).

Thus, a federal court must observe the equal protection obligation to refrain from invidious discrimination in framing decrees under its limited remedial powers.

Use of race consciousness may be necessary in addressing remedies for racial discrimination, for, "[i]n order to get beyond racism, we must first take account of race." *Regents of University of California* v. *Bakke*, *supra*, at 438 U.S. 307 (separate opinion of Blackmun, J.) and governmental race-conscious measures have satisfied this Court. However, this Court has never approved any use of a racial classification to divest an individual of his employment; its limited approvals do not extend to, and would not countenance, layoffs of in-

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[17] "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 93 (1976) (*per curiam*).

cumbent employees by race and ethnicity to satisfy a judicial mandate that precise racial and ethnic ratios prevail, as the First Circuit does.

Any use of a racial and ethnic classification is subject to exacting scrutiny; a use is inherently suspect; and a specific use must be "precisely tailored" and "necessary" to achieve "a compelling governmental interest." *Fullilove* v. *Klutznick*, 448 U.S. 448, 507 (opinion of Powell, J., concurring), and 524-26 (opinion of Stewart and Rehnquist, J.J., dissenting); *Regents of University of California* v. *Bakke*, 438 U.S. 265, 290-91, 299, 305 (1978) (opinion of Powell, J.); and *Loving* v. *Virginia*, 388 U.S. 1, 9, 11 (1967). A federal court decree *must* satisfy these same conditions when it employs a racial or ethnic classification. Such an order must, "by a balancing of the individual and collective interests [correct] 'the condition that offends the Constitution'"; it can be entered "'only on the basis of a constitutional violation' and, . . . 'the nature of the violation determines the scope of the remedy.'" (Citation omitted.) *Milliken* v. *Bradley*, 418 U.S. 717, 738 (1974).

The decision of the First Circuit must fail because of its inconsistencies with these fundamental principles.

Even at first glance, the order's requirement that a minimum of 14.7% of the fire department's jobs must be allocated to black and Spanish-surnamed persons seems to be a "racially invalid preference" that cannot withstand strict scrutiny.[18]

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[18] The 14.7% establishes an absolute quota on the minimum number of minorities to be employed during the order's life while any additional hiring is still subject to the comensuration features of the 1974 Decree (which are not at issue now). That result parallels the Davis special admissions programs criticized by Justice Powell at 438 U.S. 319-320:

> It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. . ., they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At

The Court of Appeals, does find that the "fact of past discrimination" constitutes a "compelling need" to justify this employment retention quota, 679 F.2d 977; Pet. A. A23. Yet, this disputed measure confers employment advantages on individuals who, by definition, were not victims of the 1972 and earlier exams and recruitment deficiencies. They are 1979 and 1978 minority hires who sat for new examinations administered after satisfactory recruitment programs. *Bakke, supra,* at 307-8 recognizes that "ameliorating, or eliminating where feasible, the disabling effects of *identified* discrimination [may be a compelling need] . . . since the legal rights of the *victims* must be vindicated." (Emphasis supplied.)[19] *Fullilove* v. *Klutznick,* 448 U.S. 448 (1980) confirms the imperative that only victims of identified racial discrimination are entitled to proper racially conscious relief. In *Fullilove, supra,* this Court sustained a provision of the Public Works Employment Act of 1977 against a facial challenge, on equal protection grounds, to its requirement that 10% of federal grants be used by grantees to procure services and supplies from minority business enterprises (MBE's). A majority of the justices agree that racial and ethnic preferences can stand only as remedies for victims of identified past discrimination. The plurality opinion of Chief Justice Burger observes that the MBE provision could not satisfy constitutional standards in the absence of an administrative program providing assurance that the stat-

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the same time, the preferred applicants have the opportunity to compete for every seat in the class.

By its terms the order is in effect indefinitely. Pet. A. A28, A29. Its unlimited perpetuation hardly comports with the duration factor noted in *Fullilove* v. *Klutznick, supra,* at 448 U.S. 511 (opinion of Powell, J.).

[19] Note also Justice Powell's comment at 438 U.S. 301, that "the Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in *identified,* race based *injuries* to individuals entitled to the preference." (Emphasis supplied).

ute's racial and ethnic preferences would be available only to MBE's actually impaired in access to public contracting opportunities, 448 U.S. 487, that this administrative mechanism should "prevent unjust participation in the program by those minority firms whose access to public contracting opportunities is not impaired by the effects of past discrimination", 448 U.S. 482, and that misapplications can be limited. 448 U.S. 489. Justice Powell, in his concurring opinion notes that remedies can be imposed to "make persons whole for injuries suffered on account of unlawful . . . discrimination", quoting *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418 (1975) and finds no constitutional reason to invalidate the MBE provision when "Congress determined that minority contractors were victims of purposeful discrimination." 448 U.S. 497 and 516. Justice Stewart, in his dissenting opinion in which Justice Rehnquist joins, observes "[e]xcept to make whole the identified victims of racial discrimination, the guarantee of equal protection prohibits the government from taking detrimental action against innocent people on the basis of the sins of others of their own race." 448 U.S. 530-531 n. 12. Justice Stevens makes the same point that preferences must advantage "victims of unfair treatment in the past." 448 U.S. 553.

Other differences between the present case and *Fullilove* reenforce the conclusion that the MBE set-aside approved in *Fullilove* does not support the exclusionary racial and ethnic criteria approved by the First Circuit. *Fullilove*, *supra*, deals not "with the limited powers of a federal court, for example, but with the broad remedial powers of Congress." 448 U.S. 484. *Fullilove* disposes only of a facial challenge to the set-aside provision with no attempt to show "that as applied in identified situations the MBE provision violated the constitutional or statutory rights of any party." 448 U.S. 481. In contrast, the present case deals precisely with the "limited remedial" powers of a federal court and this record demon-

strates violations of constitutional and statutory rights of at least 83 firefighters excluded from their employment only because they did not possess favored racial and ethnic characteristics.

Fullilove v. *Klutznick, supra,* and *University of California Regents* v. *Bakke, supra,* confirms that vindication of victims is still essential to justify use of racial and ethnic exclusionary criteria. Under settled precedent, use of such criteria to conserve employment for non-victims at the expense of other innocent employees is not "a precisely tailored" remedy and does not satisfy any "compelling need."

A race-conscious remedy should not be approved without consideration of an additional factor: the effect of the set aside upon innocent third parties. *Fullilove* v. *Klutznick, supra,* at 448 U.S. 514 (opinion of Powell, J., concurring). This Court has never approved any measure designed to improve a disadvantaged group's members access to an opportunity by excluding individuals belonging to another group from the same opportunity, for example, *United Jewish Organizations* v. *Carey,* 430 U.S. 144 (1979) did not exclude individuals from the franchise; and *Lau* v. *Nichols,* 414 U.S. 563 (1974) did not result in denials to individuals of a "meaningful opportunity to participate in the educational program". In the Title VII employment discrimination cases "some burdens" are imposed, if, and only if, necessary "as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference." *Regents of University of California* v. *Bakke, supra,* 438 U.S. 301-05 (opinion of Powell, J., concurring). This case is not one in which access expectations of innocent individuals are merely diluted. Present interests are divested completely. While innocent individuals may need to "share the burdens" when a "limited and properly tailored remedy" is implemented, *Fulli-*

love v. *Klutznick*, *supra*, at 448 U.S. 484, (opinion of Burger, C.J.), there is no requirement sanctioned by any prior decision of this Court that innocent third parties shoulder the entire burden.

However, the Court of Appeals justifies such an exclusive imposition with this comment, 679 F.2d 977; Pet. A. A24: "We also must recognize that whites as a group reaped significant advantages in the past in hiring and promotion at the expense of blacks and hispanics . . .." But this case does not involve the rights of one group or another. It involves the loss of 83 jobs by 83 individuals and the mechanism to identify the 83 individuals. The mechanism identifies 83 individuals solely on the basis of race and ethnicity who had no more significant advantage in obtaining this employment that the 83 who were retained. The First Circuit's view of equities in terms of whites as a group and blacks and Spanish-surnamed persons as another group ignores the well-established principle that equal protection rights are individual rights, not group rights. *Regents of University of California* v. *Bakke*, *supra*, at 438 U.S. 289 and 299.

In this case, the First Circuit's focus on "groups" approves the disregard for the personal rights to equal protection of 83 persons on whom it chooses to put the entire burden to remedy a new view of "past discrimination" only because these persons do not possess certain preferred racial and ethnic characteristics. Another 83 individuals are exempted absolutely from the same burdens only because they do possess the preferred racial and ethnic characteristics even though they were never victimized by the past discriminatory acts. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer*, 334 U.S. 1, 22 (1948). "The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded

the same protection, then it is not equal." *Regents of University of California* v. *Bakke, supra*, 438 U.S. 289-90 (Opinion of Powell, J.).

The displacement of 83 individuals on racial grounds stands in stark contrast to the care taken in the 1974 decree, affirmed by the First Circuit, 504 F.2d 1017 (1st Cir. 1974) and the 1975 modifications to share the burden of a remedy. That former example represents the correct "tailoring" of a remedy for specific discrimination; the present example surely does not.

Ironically, the district court judge who presided over *Boston Chapter, NAACP, Inc.* v. *Beecher, et al*, until spring, 1981, denied a plaintiff's motion to increase the ratio of Group C certifications to the City of Springfield Fire Department on November 16, 1976, stating at J.A. 30a:

> the court is not of the opinion that an amendment to the 1974 decree, which was issued well over two and one-half years ago, is the proper way to remedy any underrepresentations of those two minority groups. Prior to the issuance of the 1974 Decree, this Court gave careful consideration to past discrimination in the selection of firefighters in Massachusetts and possible ways to compensate for it which would at the same time avoid the creation of a procedure that might lead to reverse discrimination. I feel that the preference established in the decree is sufficient to remedy that problem.

Now, six years later, that specter is real.

Still another irony in the earlier stage of this case is reflected in a note following the First Circuit's description of the four groups in the 1974 decree as follows, at 504 F.2d 1017 n.16:

> Nor will the order result in the firing of those who have received provisional appointments pursuant to the current, but now invalid eligibility list. Those temporary appointees will be placed at the top of the Group B list, and their appointments made permanent on a one to one basis with permanent appointments from Groups A and C. None will be fired.

This 1974 concern for the rights of innocent parties is lost in 1981.

The order entered in 1981 is based on no present "compelling need" and its imposition of the total burden on individuals identical in every relevant characteristic, save race and ethnicity, is not "tailored" to the original wrong and infringes on the equal protection rights of the individuals it punishes. It imposes an invidious racial displacement preference utterly hostile to the equal protection guarantees of the Constitution. *Minnick* v. *California Dept. of Corrections*, 452 U.S. 105, 128 (1981) (opinion of Stewart, J., dissenting): *Fullilove* v. *Klutznick*, 448 U.S. 448, 523-527 (1980) (opinion of Stewart and Rehnquist, J.J., dissenting); *Regents of University of California* v. *Bakke*, 438 U.S. 265, 307 (1978), (opinion of Powell, J.); *DeFunis* v. *Odegaard*, 416 U.S. 312, 341-42 (1974) (Douglas, J.); and authorities there cited. If "the equal protection of the laws is a pledge of the protection of equal laws", *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369 (1886), that pledge was repudiated when this order entered.

The First Circuit also justifies the 1981 order as "necessary to preserve the integration already achieved" and necessary "to prevent the departments from regressing to the state of precipitous racial imbalance that prevailed at the commencement of this litigation." 679 F.2d 975, 979; Pet. A. A20, A23. Yet prior to 1981, elaborate, carefully considered, even-handed

orders addressed "identified discrimination", examinations and recruitment techniques of unintentional disproportionate impact and achieved progress in overcoming its effects. Minority representation increased from 0.9% at the start of the litigation to 14.7% on July 6, 1981. 679 F.2d 970; Pet. A. A10. Once having implemented such earlier even-handed remedies, the lower courts had no power in 1981 to insist that specific racial percentages be imposed on the firefighter force now. *Pasadena City Bd. of Education* v. *Spangler*, 427 U.S. 433, 435-437 (1976).

Of overriding concern to the First Circuit is its perception of 1981 racial and ethnic imbalance. Its focus on "imbalance" is plain from other comments in its opinion: it observes, "the orders require that there be a certain percentage of minorities on the Police and Fire Departments without regard to whether the individuals compromising the minority percentage were the actual victims of past discrimination." 679 F.2d 975; Pet. A. A20, A21; it casts this case as one of "two competing rights, earned seniority versus racially balanced police and fire departments," 679 F.2d 977; Pet. A. A25; it describes the 1972 litigation as seeking relief "to correct a condition of racial imbalance", 679 F.2d 976, Pet. A. A22; and it rejects earned seniority to conserve "racial equity" 679 F.2d 978, Pet. A. A25. This objective — the redress of an imbalance or "racial equity" — is simply not a proper judicial one. *Pasadena City Bd. of Education* v. *Spangler, supra. Accord, Swann* v. *Board of Education*, 402 U.S. 1, 24 (1971): "If we were to read the holding of the District Court to require, as a matter of substantive constitutional right, any particular degree of racial balance or mixing, that approach would be disapproved and we would be obliged to reverse." *Id.* Since the overriding concern here is to ensure specific racial balances, based on 1981 perceptions, this Court must reverse.

Equally important to the First Circuit is the fact that these preferential orders involve the public safety departments of a large metropolitan city that now has a minority population of at least 30% in which the public interest required a "racially balanced police force". No expert testimony was needed to convince the First Circuit that: "unless the public safety departments of a city reflect its growing minority population, there is bound to be antagonism, hostility, and strife between the citizenry and those departments. The inevitable result is poor police and fire protection for those who need it most."; and quoting *Detroit Police Officers' Ass'n.* v. *Young*, 608 F.2d 671, 696 (6th Cir. 1979), *cert. denied*, ____ U.S. ____, 101 S.Ct. 3079 (1981), that:

> The argument that police need more minority officers if [*sic*] not simply that blacks communicate better with blacks or that a police department should cater to the public's desires. Rather, it is that effective crime prevention and solution depend heavily on the public support and cooperation which result only from public respect and confidence in the police. In short, the focus is not on the superior performance of minority officers, but on the public's perception of law enforcement officials and institutions.

679 F.2d 977-78; Pet. A. A24, A25.

There is no evidence in this record to support this new justification of the First Circuit and this justification is dubious at best in its application to fire departments. Use of racial and ethnic preferences for these objectives does not relate to "any compelling need" recognized by this Court and its use here should be rejected.

Such an operational needs justification does not involve remedies for victims of identified racial and ethnic discrimination. The premises of "public interest", of "antagonism, hostility and strife", of "poor police and fire protection", of the public's perception of law enforcement officials and institutions", of "effective crime prevention", all important factors in the estimate of the First Circuit, 679 F.2d 977, accept that public perception of racial differences can dictate public hiring and personnel complement policies. The astonishing result is that, instead of overcoming racial and ethnic stereotypes, such stereotypes may be perpetuated by use in the ways endorsed by the First Circuit.

In the absence of a detailed and complete record and adequate findings that operational necessity is a compelling need justifying racially determined staffing patterns in the Boston Fire Department, there is simply no basis for the First Circuit's relying on such a justification as it did.

Justice Powell states in *Fullilove, supra,* at 448 U.S. 516, that "the use of racial classifications, which are fundamentally at odds with the ideals of a democratic society implicit in the Due Process and Equal Protection Clauses, cannot be imposed simply to serve transient social or political goals, however worthy they may be." His observation has application to the quoted justifications of the First Circuit. *Accord, Regents of University of California* v. *Bakke, supra,* at 438 U.S. 361, (opinion of Brennan, White, Marshall, and Blackmun, concurring and dissenting). ". . . even if the concern for individualism is weighed by the political process, that weighing cannot waive the rights of individuals under the Fourteenth Amendment." *Id.*)

Any justification based on "public perceptions" is never self-limiting.

Inevitably its logic may perpetuate racial polarization, racial stereotypes, and racial perceptions if it is accepted. Such

acceptance seems inconsistent with resolute "dedication to the principle that the constitution envisions a nation where race is irrelevant." *Fullilove* v. *Klutznick*, *supra*, at 448 U.S. 516 (opinion of Powell, J., concurring). The real premise of that logic is vulnerable to Justice Stewart's criticism in *Fullilove*, *supra*, at 448 U.S. 532 (opinion of Stewart and Rehnquist, dissenting) as follows:

> Most importantly, by making race a relevant criterion once again in its own affairs, the Government implicitly teaches the public that the apportionment of rewards and penalties can legitimately be made according to race — rather than according to merit or ability — and that people can, and perhaps should, view themselves and others in terms of their racial characteristics. Notions of "racial entitlement" will be fostered, and private discrimination will necessarily be encouraged.[nn]

Footnote [nn] continues:

> "Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." *Olmstead* v. *United States*, 227 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (Brandeis, J., dissenting).

Conclusion.

The decision and judgment of the First Circuit should be reversed and judgment entered denying plaintiff's motion to modify prior remedial orders.

Respectfully submitted,

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